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In the Supreme Court of the United States

OCTOBER TERM, 1960.

No. 807

GIANT TIGER DRUGS, INC.,

Appellant,

vs.

THE STATE OF OHIO,

Appellee.

ON APPEAL FROM THE FINAL ORDER OF THE SUPREME COURT OF THE STATE OF OHIO DISMISSING AN APPEAL OF THE JUDGMENT OF THE COURT OF APPEALS FOR CUYAHOGA COUNTY, STATE OF OHIO, AFFIRMING THE CONVICTION OF THE APPELLANT (PURSUANT TO 28 U. S. C. SECTION 1257 (2)).

JURISDICTIONAL STATEMENT.

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JURISDICTIONAL STATEMENT.

A. OPINIONS DELIVERED IN COURT BELOW.

The opinion of the Municipal Court of the City of Euclid, State of Ohio, is unreported, and is annexed hereto Appendix A. The conviction was affirmed by the Court of Appeals for the County of Cuyahoga, State of Ohio, in an unreported decision, without opinion, the Journal Entry in said Court being annexed hereto as Appendix B. The Supreme Court of the State of Ohio dismissed an appeal from the decision of the Court of Appeals of Cuyahoga County, Ohio, for the reason that no debatable constitutional question was involved. The decision is reported in Volume 171 O. S. at page 294. This is a final order from the highest Court in the State of Ohio and is annexed hereto as Appendix C.

B. STATEMENT OF THE GROUNDS ON WHICH JURISDICTION IS INVOKED.

Appellant was convicted of a violation of Ohio Revised Code Section 3773.24, a so-called Sunday Closing Law. The Appellant seeks a review of the conviction by the Municipal Court of Euclid, which was affirmed by the judgment of the Court of Appeals for Cuyahoga County, Ohio, which said judgment was sustained by a final order of the Supreme Court of Ohio, dismissing the appeal as of right. Notice of Appeal was filed in the Supreme Court of the State of Ohio.

The jurisdiction of this Court is invoked under 28 U. S. C. Section 1257 (2), the appeal being from a decision "involving the validity of a statute of a State upon the grounds that same is repugnant to the Constitution of the United States." *Everson v. Bd. of Education*, 330 U. S. 1 (1947), *Winters v. New York*, 333 U. S. 507 (1948), *McGowan v. Maryland*, Supreme Court of the United States, October Term, 1960, No. 8.

C. STATUTE AND CRIMINAL PENALTIES INVOLVED.

Revised Code Section 3773.24, as amended by the Ohio Legislature in 1959 reads in full as follows:

> "No person, firm, or corporation shall engage in common labor or suffer or permit a building or place to be open for transaction of business, or require a person in his employ or under his control to engage in common labor or to open a building or place for the transaction of business on Sunday. In prosecutions under this section complaints shall be made within ten days after a violation.
>
> "This section does not apply to work of necessity or charity, and does not extend to persons who conscientiously observe the seventh day of the week as

the sabbath, and abstain thereon from doing things prohibited on Sunday.

"This section shall not apply to:

(A) Traveling or the providing of services and commodities incidental thereto;

(B) Recreation, sports, amusements, entertainment, or exhibitions or the providing of services and commodities incidental thereto;

(C) Fairs held under the authority of the state or a political subdivision, or independent fairs, or the providing of services and commodities incidental thereto;

(D) The operation of publicly owned places of entertainment, recreation, or education, by a public officer, concessionaire, exhibitor, or employees of all or any of them, or any other person, or the providing of services and commodities incidental thereto."

Revised Code Section 3773.99 (Q) provides as follows:

"Whoever violates Section 3773.24 of the Revised Code shall be fined twenty-five dollars for a first offense; for each subsequent offense such person shall be fined not less than fifty nor more than one hundred dollars and imprisoned not less than five nor more than thirty days."

D. QUESTIONS PRESENTED.

The following questions are presented:

1. Whether Ohio Revised Code Section 3773.24 and the provisions thereof are ambiguous, unreasonable, arbitrary and discriminatory in the classification of the individual's businesses and commodities affected, in violation of the Fourteenth Amendment to the Constitution of the United States.

2. Whether Ohio Revised Code Section 3773.24, which requires the closing of a legitimate business on

Sunday and which prohibits a person from working on Sunday, is such an unlawful limitation on the right to contract and to use one's property as to violate the Fourteenth Amendment to the United States Constitution.

3. Whether a state law, such as the Ohio "Sunday Closing Law," barring labor, business or work on Sunday, violates the clauses of the First Amendment prohibiting an establishment of religion and guaranteeing its free exercise, and violates the equal protection clause of the Fourteenth Amendment.

E. STATEMENT OF THE CASE.

On September 14, 1959, a warrant was sworn to and arrest made of Giant Tiger Drugs, Inc., charging that on the 6th day of September, 1959, being the first day of the week, commonly called Sunday, did unlawfully suffer or permit a building located at 22480 Shore Center Drive, Euclid, Ohio, to be open for transaction of business in violation of Section 3773.24 of the Revised Code of Ohio.

The item purchased and offered in evidence was a small lawn mower, price $18.88 (Record 11).

The store referred to in the warrant is away from the downtown district and caters largely to neighborhood trade.

During the course of the trial and at the conclusion thereof, motions were made by the Appellant for dismissal on the grounds that the statute was in violation of both the First and Fourteenth Amendments to the Constitution of the United States. These motions were overruled (Record page 6). The exceptions were noted and the Trial Court found the Appellant guilty and a fine imposed. On the appeal to the Court of Appeals and to the Supreme Court of Ohio, assignments of error and briefs were filed in the respective courts, raising the constitutionality of the

statute as being in conflict with the First and Fourteenth Amendments to the Constitution of the United States.

F. THE QUESTIONS PRESENTED ARE SUBSTANTIAL, WERE WRONGLY DECIDED BELOW AND ARE OF GREAT PUBLIC IMPORTANCE.

1. The Statute is Ambiguous, Unreasonable, Arbitrary and Discriminatory in Classifications.

There are numerous exceptions as the Court will observe in the Act, Paragraph (A), By direction of the Act, it is provided that this section "shall not apply to traveling or the providing of services and commodities incidental thereto." The term "traveling" and the providing of services and commodities thereto would embrace and include trains, airplanes, buses, bicycles, automobiles, motorcycles, boats and automobile trailers. The commodities incidental to all these items would be an endless list, which would and should include garages for storage and repairs, gasoline service stations, oiling and washing of automobiles, bicycle stores for the sale of bicycles and repair thereof, as well as motorcycles, the sale of traveling bags and luggage and other traveling accessories, which could well embrace and include some article of apparel, an auto trailer used for traveling would require furniture, electrical equipment, cooking utensils and food, cooked and uncooked, as well as fruits and vegetables. It would, in my judgment, include as well the sale of automobiles by dealers, both new and used, as these are commodities incidental to traveling. The list is an endless one and I have hardly scratched the surface.

Taking exception (B) of the Law, namely "recreation, sports, amusements, entertainment or exhibitions or the providing of services and commodities incidental thereto," this would include ground keepers, greens keepers, repair

of facilities, cutting of grass, sale of tickets, caddies, sale of all types of equipment, and all of the labor used for skating, fishing, baseball, football, race tracks, radio stations and television studios, boating, theatres, moving picture houses, prize fights, wrestling matches, saloons, night clubs, burlesque theatres, bowling, hunting and tennis. In addition thereto, all of the commodities incidental to any of the above, and I have by no means included all of the items which would be proper under this section, would be appropriate items of business, which would include and embrace persons rendering common labor to participants and then to the shop keepers, who would sell all of the commodities used "in connection therewith."

The next exception, to-wit "Fairs held under the authority of the state or a political subdivision, or independent fairs, or the providing of services and commodities incidental thereto." It is to be noted at this point that the Act was passed and declared to be an "emergency measure" necessary for the immediate preservation of public peace, health and safety, and that the reason for such necessity lies in the fact that this would insure the Sunday operation of the state and county fairs. Yet, Paragraph (C) of the exception makes provision for independent fairs, which could well be an exhibition and sale of commodities, conceived, maintained and operated by individuals having no connection whatsoever with either the State of Ohio or the county. Now the operation of fairs, both county and state and independent, involves much common labor and the sale of many different commodities. As pointed out, what makes it necessary or desirable that fairs operate on Sunday and sell all nature of commodities when no other businessman is permitted so to do elsewhere in his own place of business?

The last exception, namely Paragraph (D), provides for "the operation of publicly owned places of entertain-

ment, recreation or education, by a public officer, concessionaire, exhibitor, or employees of all or any of them, or any other person, or the providing of services and commodities incidental thereto." This paragraph, then, makes provision for common labor in all publicly owned places of entertainment, etc. and the providing of services and commodities incidental thereto, which shows that the law under consideration is decidedly discriminatory.

I have gone to some length to enumerate the number of items that could come under the exceptions and the number of commodities that would, by the language of the law, be properly sold and provided, to point up the objection which we find to this law to the effect that by the various exceptions, the Legislature has created a condition which indeed constitutes class legislation, is discriminatory and incapable of clear construction. We are charged in this case with the sale of a small lawn mower.

Every one of the exceptions, from (A) to (D) included, provide for the sale of commodities incidental thereto and in any instance, and as to any of the commodities therein treated, I believe that a small lawn mower is a commodity which could be "incidental thereto."

The law as drawn will create an avalanche of prosecutions for the confusion in determination by way of interpretations, which makes it impossible to arrive at a proper conclusion.

Farmers, in the depression, discovered they could lure passing traffic with a vegetable stand. Their wives added jellies, knitgoods, hooked rugs. Sunday was the day America took to the road!

Who objects to Sunday sales? The answer is obvious, that the pressure comes from certain groups who have been constantly agitating for its enforcement because of their own selfish interests. By virtue of the numerous changes which have thus far been engrafted on the original

law, due to the arbitrary exertions of different pressure groups, the statutes have become riddled with inconsistencies and unexplainable classifications. Consequently, the laws are enforced discriminately and essentially have become a weapon in an economic struggle.

2. The Statute Is in Violation of the Fourteenth Amendment to the Constitution of the United States as Being an Unlawful Limitation on the Right to Contract and to Use One's Property.

An examination of the origin of Sunday laws establishes that their function is to compel observance of the Christian holy day. Both the majority and minority opinions below acknowledge that the Massachusetts statute originally had religious motivation and purpose. *Crown Kosher Super Market v. Raymond P. Gallagher*, 176 F. Supp. 466 (D. Mass. 1959) The statute of 1653 was intended "to compel a seemly observance" of the Sabbath celebrated by the dominant Christian sect. The preamble to the early forms of the statute made its religious intent obvious.

The Supreme Court of New Jersey describes Sunday legislation as "the product of Church-State Unions. The American colonists brought with them the tradition of the state established religion * * * and perhaps solely for sectarian reasons the authority of colonial government was exerted to support the Christian Sabbath." *Two Guys From Harrison-Allentown, Inc. v. Furman*, 32 New Jersey 199, 205 (1960).

The New York Court of Appeals also recognized that Sunday Laws "may be said to have had a religious origin." *People v. Friedman*, 302 New York, 75 (1950).

The Superior Court of Pennsylvania, in *Commonwealth v. Hoover*, 25 Pa. Super. Ct. 133 (1904), in tracing

the origin and development of Sunday Laws, said: "Sunday legislation is more than fifteen centuries old, and the historic argument is of value in construing existing law." "All Sunday legislation is the product of pagan Rome; the Saxon laws were the product of Middle Age legislation of the Holy Roman Empire. The first Sunday law, the edict of the Emperor Constantine, was the product of that pagan conception developed by the Romans which made religion a part of the state. During the Middle Ages, the civil authorities exercised the right to legislate in religious matters after the manner of the Jewish Theocracy."

The highest court of Massachusetts described Sunday statutes in the same way. "Our Puritan ancestors intended that the day (Sunday) should be not merely a day of rest from labor but also a day devoted to public and private worship and to religious meditation and repose, undisturbed by secular cares of amusements. They saw fit to enforce the observation of the day by penal legislation, and the statute regulations which they devised for that purpose have continued in force without any substantial modification to the present time." *Davis v. Somerville*, 128 Mass. 594 (1880).

An examination of the Sunday laws currently on the statute books of the various states, and particularly that of the State of Ohio, shows beyond doubt that the original motivation and intent of such legislation still continues. The fact that Revised Code Section 3773.24, adopted by the Ohio Legislature, the Act in question in this cause, states that "This section does not apply to work of necessity or charity and does not extend to persons who conscientiously observe the seventh day of the week as the Sabbath and abstain thereon from doing things prohibited on Sunday," proves its religious basis.

This treatment, by the Ohio Legislature, and the use of the word "Sabbath," clearly concedes the law was de-

signed to cover and to carry forward the observance of the Christian Sabbath, to-wit, Sunday.

Sunday Laws violate the religious freedom of Jews, Seventh Day Adventists, Seventh Day Baptists and all others who do not observe Sunday as their holy day. The present Sunday Laws require religious non-conformists to manifest a pattern of conduct inconsistent with their own religious commitment and consistent only with the religious beliefs of the majority. By prohibiting business and shopping on Sunday, such statutes impose an economic penalty upon those who do not observe Sunday as their Sabbath.

Therefore, we contend that equal protection of the laws, as provided in the Fourteenth Amendment, is denied to those who are not willing to observe Sunday as their Sabbath.

The "establishment of religion" clause has been defined by this Court in three recent decision: *Everson vs. Board of Education*, 330 U. S. 1 (1947); *McCollum vs. Board of Education*, 333 U. S. 203 (1948); and *Zorach vs. Clausen*, 343 U. S. 306 (1952). In the *Everson* case, the court said "'Neither a State nor the Federal Government can set up a Church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force or influence a person to go to or remain away from Church against his will or force him to profess a belief or disbelief in any religion." In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between Church and State." 330 U. S. at 15-16; see also 41, 52, 53, 59, 60.

In *McCollum*, this definition of the establishment clause was the basis for a determination that a released time program in the Public Schools of Champaign, Illinois,

violated the First Amendment. Under that program, children attending Public Schools were released one hour during each week to receive religious instruction in the school buildings from teachers provided and paid by religious groups. In an eight to one decision, this Court struck down that decision, quoting with approval the definition of establishment from the *Everson* case 330 U. S. at 210-211.

In *Zorach vs. Clausen*, *supra*, this Court reaffirmed the principles enunciated in the previous two cases.

This Court has never squarely decided the issue raised in this case. Sunday Laws have been discussed in three previous decisions, to-wit, the case of *Soon Hing vs. Chief of Police*, 113 U. S. 703 (1885), the case of *Hennington vs. Georgia*, 163 U. S. 299 (1896) and the case of *Petit vs. Minnesota*, 177 U. S. 164 (1900).

Aside from the fact that Soon Hing did not decide the validity of Sunday Laws, it is doubtful whether this Court would rule the same way if faced with the case today, especially in view of the fact that the ordinance attacked was one of many discriminatory measures then aimed at Chinese. The Court's attitude in these three cases certainly was understandable, considering the time of the decision. In those days there were few laws protecting labor. The seven-day work week and the sun-up to sun-down work day were all too common-place.

This Court in *Niemotko vs. Maryland*, 340 U. S. 268 (1951) held that the Fourteenth Amendment clearly prohibits the State and all its political subdivisions from discriminating against any person or group of persons because of their religious conviction or affiliation. In that case, Jehovah Witnesses were denied protection equal to that provided for the dominant religions.

We therefore contend that while a statute may limit the freedom of an individual to contract to sell and to sell his labor for seven days a week, it may not deprive the individual of his right himself to choose the day on which he will refrain from labor. It is possible that the legislature under its police power may require each individual to desist from work at least one day per week, but it may not constitutionally designate the particular day of the week for universal rest.

3. The Statute Is in Violation of the First Amendment, Prohibiting an Establishment of Religion and Guaranteeing Its Free Exercise and Violates the Equal Protection of the Fourteenth Amendment by Barring Labor, Business or Work on Sundays.

The Sunday Laws here in issue do not in fact require anyone to rest on Sunday. They merely require some trades, businesses and occupations not to operate on that day. They impose no obligation of rest on those businesses—almost too numerous to count—that are permitted to operate on Sunday and nothing in the Sunday Laws prohibits persons from engaging in a forbidden business for six days of the week and in a permitted business on Sunday. Such a person could engage in business seven days each week without any rest and yet would not violate the statute here in issue.

The businesses permitted by the statute of Ohio undoubtedly employs thousands of persons in the State. As far as these statutes are concerned, these persons may work seven days a week. Is this law, which has been labeled for the health and welfare, truly for this purpose, or is it not true that the predominent purpose of the statute is not to ensure rest but to prevent defilement of the Sunday Sabbath? It is aimed not at persons but at businesses.

They seek to prevent secularization of the Lord's Day. If that were not so, why select the Lord's Day as the one day of the week which persons shall rest. So far as health is concerned, it makes no difference whether a person rests every Monday or every Sunday. Why should not each business owner decide for himself the day of the week in which he will refrain from operations? Business are conducted in the open and there would be no practical difficulties in enforcing such a law. In Great Britain and in some dozen or so states in this country, persons who observe a day other than Sunday as their day of rest are permitted to operate their businesses on Sunday. *Pfeffer, Church, State and Freedom*, page 230. These exemptions have been on the law books for many years and there is no evidence that enforcement has been impracticable anywhere.

All states have enacted laws relating to hours of work, most of these apply to women and minors. Many of them also limit the number of days per week in which they may work, ordinarily not more than six. Others go further and forbid such work during the night. *Radice vs. New York*, 264 U. S. 292 (1923). All of these laws contain provisions for the enforcement and there is no reason to believe that they have not been effective or that the investigating and inspection arms of the enforcement agencies cannot properly and adequately compel a "one day of rest in seven" law.

If, therefore, for many years there have existed in the statute books of this country laws limiting hours of work, exempting from Sunday Laws observers of other Sabbaths and "one day of rest in seven" laws, which from all available evidence are operating satisfactorily and being properly enforced, there is, therefore, no need for a law compelling universal rest on Sundays and depriving the indi-

vidual from the right to choose for himself the day upon which he will desist from labor.

The existence of these statutes with their enforcement provisions and penalties clearly demonstrates that there is no need for "Sunday Laws" to protect the employees by insuring them a "day of rest" or "all persons from the physical and moral debasement which comes from uninterrupted labor."

In the Sunday Law cases of *Commonwealth vs. Cavalerro and Levenston* appearing in the *Legal Intelligencer* April 22, 1960, Judge Alexander stated "Many states * * * have one day in seven rest laws * * * and I know no problem in connection with their enforcement or with the enforcement of the labor laws referred to. Indeed, such laws generally are enforced, whereas the sporadic or discriminatory enforcement of the Sunday Laws is common knowledge and tends to bring law enforcement generally into disrepute. Where there are two methods of accomplishing the legislative purpose, that which involves less interference with business or personal liberty must be used and mere ease of enforcing a more restrictive alternative will not sustain it."

Since "one day of rest in seven" law is a reasonable, non-discriminatory alternative to Sunday Laws, we contend that the Sunday Laws should be declared unconstitutional.

CONCLUSION.

If the desired legislative purpose is to provide compulsory one day rest in seven, then the legislature in choosing a technique to accomplish this purpose, having a choice of two methods of reaching its goal, must choose that one which least interfers with the constitutional rights of the individual consistent with effective enforcement. For, if effective enforcement is absent, the goal is not achieved.

If, therefore, the legislative purpose is to assure a day of rest each week, it is sufficient for the legislature to declare that no one may work more than six days a week and to permit the individuals concerned, by contrast, to determine which day of the week shall constitute the day of of rest.

The old Supreme Court cases holding Sunday Laws based on the police power of the states to pick Sunday as the universal day of rest should be overruled as has been evidenced in recent Supreme Court decisions in matters of great public concern and changed conditions. The automobile age, the distance of shopping centers from concentrated areas of population, the demands of minorities to observe their own days of rest for purposes of religious worship, the need of the public for manifold forms of recreation and entertainment on their days of rest: All these call upon the judicial arm of our government to protect the right of all men to choose their form of rest and worship, and also the time thereof, so long as it does not interfere with the rights of others to enjoy their days of rest and worship in the manner and at the time they see fit. The changed habits of the people and the growth of towns and cities in contrast to the essentially village conditions of earlier centuries, the development of motor transport and above all the effect of two World Wars have made the state regulation of Sunday almost an anachronism.

In view of the previous action of this Court in noting probable jurisdiction and assigning for hearing several cases which raise constitutional issues similar to those presented by this appeal, it is respectfully submitted that this Court should note probable jurisdiction in this matter and set this case for hearing.

Respectfully submitted,

H. H. FELSMAN,

Attorney for Appellant.

APPENDIX A.

COURT'S FINDING AND FINE.

BURNS, J.: Parties in Court, Trial had. Defendant found guilty. Fined $25.00 and costs.

APPENDIX B.

JOURNAL ENTRY OF THE COURT OF APPEALS OF CUYAHOGA COUNTY, OHIO.

This cause came to be heard upon notice of appeal, transcript of the original docket and journal entries, bill of exceptions, original papers and assignment of errors from the Municipal Court of Euclid, Ohio. The Court finds, however, that there were reasonable grounds for this appeal.

It is therefore ordered and adjudged by the Court that the judgment aforesaid be affirmed and that the Appellee recover from the Appellant its costs herein expended.

It is further ordered that a special mandate be sent to the Municipal Court of Euclid to carry its judgment into effect.

To all of which the Appellant excepts.

APPENDIX C.

FINAL ORDER OF THE SUPREME COURT OF THE STATE OF OHIO.

This cause came on to be heard upon the transcript of the Record of the Court of Appeals of Cuyahoga County, as upon the motion of the appellee to dismiss the appeal, filed as of right herein, and was argued by counsel.

On consideration whereof, it is ordered and adjudged that said appeal be, and the same is sua sponte dismissed for the reason no debatable constitutional question is involved in said cause.

It is further ordered and adjudged that the appellee recover from the appellant its costs herein expended, taxed at $_____.

ORDERED, That a special mandate be sent to the Municipal Court of the City of Euclid, Ohio, to carry this judgment into execution.

ORDERED, That a copy of this entry be certified to the Court of Appeals of Cuyahoga County, "for entry."